Kentucky Law Journal

Volume 29 | Issue 1 Article 9

1940

Process Service on Resident Agent of Non-Resident: Is Sec. 51-6 of the Kentucky Civil Code Constitutional?

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jurisdiction to grant H a divorce[19] and also has jurisdiction to award the custody of C.[20]

(b) Husband, Wife and Child are domiciled in state X. W goes to state Y and sues for a divorce, H being at fault. H does not appear. State Y does not have jurisdiction to award the custody of C.[21]

(3) Husband, Wife and Child are domiciled in state X. H (or W) obtains a divorce and C is awarded to his (or her) custody. The party not entitled to custody abducts C and flees to state Y, establishing residence. The party entitled to custody brings habeas corpus for possession of C in state Y. State Y has jurisdiction to alter the award previously given upon a showing of changed conditions.[22]

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PROCESS SERVICE ON RESIDENT AGENT OF NON-RESIDENT. IS SEC. 51-6 OF THE KENTUCKY CIVIL CODE CONSTITUTIONAL?

The Kentucky Court of Appeals referred in a recent decision[1] to a prior case[2] which declared that sec. 51-6 of the Civil Code providing for substituted service upon the agent of a nonresident individual or partnership doing business within the state in actions against the nonresident[3] was unconstitutional. The judicial treatment of that section is very interesting, since both the Supreme Court of the United States and the Kentucky Court of Appeals have changed their

[19] Elwood Rosenbaum, *Extraterritorial Validity of Ex Parte Divorces*, (1940) 28 Ky. L. J. 247, 249.

[20] Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542, 544 (1907) states that the state which is the domicile of the child and the domicile of the father is the state entitled to award custody. Although the illustration used is composed of somewhat different facts, it is readily seen that the domicile of the child follows the domicile of the father until it has been legally given to the other parent; therefore it is in state Y.

[21] No case has been found involving this particular point, but by analogy to the cases cited it would seem that C's domicile remained in state X with the father until the mother was entitled legally to its custody. There had been no previous award of custody; therefore the wife must seek her divorce at the domicile of the child if the court awarding the divorce is to have jurisdiction to award the child.

[22] Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1917); The significant factor in this situation is that there has been a previous decree in another state and the jurisdiction taken goes only to altering such a decree.

[1] Jones v. Fuller, 280 Ky. 671, 134 S.W. (2d) 240 (1939).

[2] Andrews Bros. v. McClanahan, 220 Ky. 504, 295 S.W. 457 (1927).

[3] Ky. Civic Code (Carroll's 1938) sec. 51-6. "In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action accrued."

position on the question. The point raised by the statute has also been the subject of extended comment by learned writers.[4]

The Kentucky decisions up to 1927 were uniform in upholding the constitutionality of the provision for substituted service of a nonresident defendant under the circumstances set out in the Act.[5] However, in 1919, the United States Supreme Court passed on the question in the case of *Flexner* v. *Farson*,[6] which arose in the following manner: Plaintiff brought an action of debt in Illinois on a Kentucky money judgment, for which the cause of action had arisen in Kentucky. Defendants, the same in both suits, were nonresidents of Kentucky, but had been doing business there as partners through one Flexner as an agent. The plaintiff in the Kentucky action served the defendants by directing summons to Flexner, purportedly under sec. 51-6, but *after he had ceased to act as agent for the defendants.* Plaintiff obtained judgment by default on defendants' failing to appear. In the suit on the Kentucky judgment in Illinois, the court held for the defendants. An appeal to the Supreme Court of the United States on the basis of a denial of full faith and credit followed.

Although, as has been pointed out by eminent writers,[7] it was possible to hold the Kentucky judgment void on the ground that the service statute had not been complied with because Flexner was no longer defendants' agent when served, it has been suggested that the Court placed its decision that the judgment was not entitled to full faith and credit on the unconstitutionality of the statute. In holding for the defendants the Court (opinion by Mr. Justice Holmes) said:[8]

> "But the consent that is said to be implied in such cases (where the nonresident defendant is a corporation) is a mere fiction, founded upon the accepted doctrine that the states could exclude foreign corporations altogether, and therefore could establish this obligation (consent to substituted service on resident manager) as a condition to letting them in. . . . The State had no power to exclude the defendants and on that ground without going further the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void."

This case was followed by *Andrews Bros.* v. *McClanahan*[9] in which the Kentucky Court of Appeals held substituted service as provided by

[4] Beale, The Conflict of Laws (1935) sec. 84.3, et seq.; Stumberg, Conflict of Laws (1937) p. 92, et seq.; Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 Harv. L. Rev. 871; Beale, *Progress of the Law 1918-1919* (1919) 33 Harv. L. Rev. 1, 12; Scott, *Jurisdiction Over Nonresident Motorists* (1926) 39 Harv. L. Rev. 563, 583; Comment (1935) 48 Harv. L. Rev. 1433.

[5] Consult the annotations following Ky. Civil Code (Carroll's 1938) sec. 51-6.

[6] 248 U. S. 289, 63 L. ed. 250, 39 Sup. Ct. 97 (1919).

[7] Beale, The Conflict of Laws (1935) sec. 84.3; Stumberg, Conflict of Laws (1937) p. 94; Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 Harv. L. Rev. 871, 890-891; Scott, *Jurisdiction Over Nonresident Motorists* (1926) 39 Harv. L. Rev. 563, 583.

[8] 248 U.S. 289, 293, 63 L. ed. 250, 253, 39 Sup. Ct. 97, (1919).

[9] 220 Ky. 504, 295 S.W. 457 (1927).

sec. 51-6 inoperative, citing the United States Supreme Court's ruling in *Flexner* v. *Farson* to sustain that result. The service in the former case was in accordance with the Code provision, since the person served was at the time of service the agent of the defendant.

The next decision in the history of the litigation centering about the provision for substituted service was the Supreme Court case of *Doherty* v. *Goodman*.[10] This controversy involved an Iowa statute,[11] substantially similar to the Kentucky statute, and so distinguished the *Flexner* case that it is worthy of consideration here. H. L. Doherty, a resident of New York doing business as Doherty and Co., operated an office in Des Moines, Iowa, for the purpose of selling corporate securities. One King was at the time of the suit in charge of this office as district manager. Suit was brought in Iowa against Doherty individually, and service was had on King, as permitted by an Iowa statute providing for service upon an agent of an indivdiual having an office for business within the state. The United States Supreme Court upheld the validity of this service, saying of *Flexner* v. *Farson*:[12]

> "(It) . . . does not sustain appellant's position. There the service was made upon one not then agent for the defendants; here the situation is different. King was manager of appellant's office when the sale contract was made; also when process was served upon him."

The Court intimated that the basis of its decision in the *Doherty* case was that the statute was a valid exercise of the police power of the state:[13]

> "Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation." ". . . under the laws of Iowa, neither her citizens nor nonresidents could freely engage in the business of selling securities."[14]

This case would seem to support the view that a state has the power to provide that service on the resident agent of the nonresident partnership or individual doing business within the state raises a duty to respond as to causes of action arising out of that business and within the state.[15] The factors making this exercise of power reasonable are

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[10] 294 U.S. 623, 79 L. ed. 1097, 55 Sup. Ct. 553 (1925).

[11] Sec. 11079, Ia. Code (1927, 1931): "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of, or connected with the business of that office or agency."

[12] 294 U.S. 623, 628, 79 L. ed. 1097, 1099, 55 Sup. Ct. 553, (1935).

[13] Id. at 627 U.S., 1099 L. ed.

[14] Id. at 628 U.S., 1099 L. ed.

[15] Stumberg, *op. cit. supra*, n. 3, at p. 95, states in a rather general way the effect of the Doherty case: "It would seem from this case that the doing of business within a state, which as an exceptional business is subject to regulation, is sufficient to confer jurisdiction over an individual through service upon his agent." In footnote six on the same page: "The idea here is not power to exclude nor power to regulate because of dangerous character, but power to regulate in general

set out by Scott as follows:[16] 1) Many such businesses are carried on without assets within the state and satisfaction of claims by attachment is impossible. 2) It is a hardship on the resident creditor for him to have to seek out the debtor in another state because such procedure would often make the cost of the remedy exceed its fruits. 3) There is little hardship on the business owner in requiring him to answer claims arising from the business where it is carried on. Scott concludes that the result of refusing a remedy in such local suits would be immunity from legal responsibility.

One would assume that the Kentucky Court of Appeals, in deciding the next case involving the validity of service under sec. 51-6, would follow the Supreme Court's lead in the *Doherty* case by holding such service valid, thus ignoring its statement in the *Andrews* case that the section was unconstitutional. The precise point has not been in issue, but the Court has in two fairly recent cases commented on the validity of the provision without reference to the *Doherty* case.

In *Greene* v. *Commonwealth, By Marshall, Sheriff*,[17] decided three years after the *Doherty* case, the Court cited the *Flexner* and *Andrews* cases in support of its decision against validity of service. The decision should have been based solely upon the plaintiff's failure to make the service required by the statute. The following statement appears in *Jones* v. *Fuller*:[18]

> "(Service on the resident agent) was certainly not sufficient to have warranted the rendition of a judgment against appellee (nonresident) as an individual had he been sued as such, since subsection 6 of the (Civil Code sec. 51) has been held unconstitutional."

The Court cited the *Greene* case above to support this dictum.

Another point remains to be considered in the determination of the constitutionality of the section under consideration.[19] The Iowa statute approved in the *Doherty* case limited substituted service to ". . . all actions growing out of, or connected with the business of that office or agency (i.e. the one served)." The Kentucky provision reads: "In actions against an individual residing in another state . . . ." It should be noted that the Iowa statute requires two things before substituted service may be had: a) the cause of action must arise within

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with the cause of action arising out of the business or, perhaps, a transaction in the state which is within its regulatory power."

[16] Scott, *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 Harv. L. Rev. 871, 888.

[17] 275 Ky. 637, 122 S.W. (2d) 523 (1938). (Not in point because the person served was not at the time of service in the employment of the nonresident defendant, nor was the latter engaged in business in the state.)

[18] 280 Ky. 671, 134 S.W. (2d) 240, 242 (1939).

[19] It may be urged that since there is no provision in the Kentucky statutes for any form of constructive service on residents in in personam proceedings, the statute under consideration is unconstitutional as a denial of privileges and immunities. This contention is met by the fact that the discrimination is based on *residence*, not *citizenship* and is therefore reasonable. See Scott, *Jurisdiction Over Nonresidents Doing Business within a State* (1919) 32 Harv. L. Rev. 871, 889.

the state and b) out of business conducted within the state. The Kentucky Act is not so limited.

The distinction may best be pointed out by example. *A*, citizen and resident of Ohio, operates a motor sales agency in Kentucky. He negligently drives his automobile in Illinois so as to injure *B*. Under the terms of the Kentucky section, *B* could in suing *A*, serve the resident manager of *A's* motor sales agency while such service under the Iowa statute is invalid. The following situation in Kentucky would be valid service and invalid in Iowa: The accident occurs while the nonresident owner is on a pleasure trip in the state where the business is located, and service is had on the resident agent.

Does the fact that the scope of the Kentucky provision is not limited by its terms to causes of action arising within the state out of business conducted therein make it so unreasonable as to be an invalid exercise of police power? It is believed that it does, and that as applied to causes of action arising outside the state and or unconnected with the business carried on within the state it is unconstitutional. However, it should be regarded as severable, and valid as to causes of action arising within the state out of business carried on therein. It is urged that that conclusion, which is supported by Professor Scott,[20] is the correct one, and should be adopted by the Kentucky Court of Appeals should this point rise again.

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COVENANTS NOT TO COMPETE IN KENTUCKY

Actions for damages for breach of contracts not to compete and suits for injunctions restraining the breach of such contracts reaching the Court of Appeals of Kentucky have been very numerous; and the decisions of that Court have shown a remarkable uniformity in the treatment of such cases. In its decisions, the court states that though the common law applying to contracts in restraint of trade is in force in this state[1] the rigor of the early rule that any contract which tended to restrain trade was void has long since been relaxed; and that the rule governing such contracts may be stated as follows: Covenants in partial restraint of trade are valid when they are agreements by a seller of business not to compete with the buyer in such a way as to decrease the value of the business; by a retiring partner not to compete with the firm; by a retiring partner not to do anything to hinder the

[20] Scott *Jurisdiction Over Nonresidents Doing Business Within a State* (1919) 32 Harv. L. Rev. 871, 890. Scott is supported in his general conclusions by Beale, *op. cit. supra* n. 3, sec. 84.3, p. 363-4. See also Scott, *Jurisdiction Over Nonresident Motorists* (1926) 39 Harv. L. Rev. 563, 583. *Cf.* Beale, *Progress of the Law* (1919) 33 Harv. L. Rev. 1, 12; Stumberg, *op. cit. supra* n. 3, p. 95, n. 6. (Quoted in n. 14, *supra*); Restatement, Conflict of Laws (1934) secs. 84, 85. See also, Comment (1935) 48 Harv. L. Rev. 1433, 1434.

[1] Scobee v. Brent, 185 Ky. 734, 216 S. W. 76 (1919); Elkins v. Barclay, 243 Ky. 144, 47 S. W. (2d) 945 (1932).